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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition of Qwest Corporation for Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides to MSN Are Not "Retail" Services Subject to Resale Under Section 251(c)(4) of the Act - WC Docket No. 02-77

Dear Ms. Dortch:

The question that Qwest Corporation ("Qwest") brings before the Commission in its Petition for Declaratory Ruling (the "*Qwest Petition*") in the above-captioned proceeding is one the Commission has addressed before: whether the bulk digital subscriber line ("DSL") offering by an incumbent local exchange carrier ("ILEC") to an Internet service provider such as MSN pursuant to federal tariff is a wholesale offering not subject to the resale requirements of Section 251(c)(4) of the Communications Act. As the Commission found in the *AOL Bulk Services Order*, this kind of bulk offering of DSL service to an ISP is not "at retail," the key qualification contained in Section 251(c)(4), because MSN, like AOL and other ISPs, uses the transmission capacity as an input and combines it with its own Internet access capability and content to provide Internet access service to end users.[1] There is no evidence in the record of this proceeding for the Commission to conclude that MSN is not the entity that is offering at retail an information service -- high-speed Internet access -- to end users. Consequently, Microsoft Corporation ("MSN"), by its attorneys, urges the Commission to grant the *Qwest Petition* to the extent that it requests a ruling that MSN's arrangement with Qwest is a wholesale offering not subject to Section 251(c)(4). Because we believe the Commission should resolve this matter on the merits under a Section 251(c)(4) analysis, the Commission need not, and we think should not for sound procedural reasons, follow Qwest's invitation to apply the tentative conclusion in the *Wireline Broadband NPRM* to the present question.

[1] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, FCC 99-330 (rel. Nov. 9, 1999) ("*AOL Bulk Services Order*").

I. The Facts and Circumstances of the MSN-Qwest Arrangement Establish that MSN Is Offering an Information Service at Retail.

MSN is one of the leading ISPs in the U.S., serving millions of customers throughout the country. MSN offers dial-up service and, in a number or regions, high-speed access via DSL, and markets this service as "MSN Broadband."[2] In addition to Internet connectivity, MSN also offers users unique content and services, including Hotmail® and MSNBC News, and does not wall in customers but permits easy search of the Internet.

Because MSN, like other ISPs, is not a telecommunications carrier, it must purchase transmission capacity from an ILEC. MSN, along with other ISPs in Minnesota, has chosen to purchase that service from Qwest by buying transmission capacity pursuant to Qwest's Tariff F.C.C. No. 1 § 8.4.4. The *Qwest Petition* describes the provisions of this tariff and correctly reports that MSN purchases bulk DSL services in sufficient quantity to make MSN eligible for Volume Commitment Plan II.[3] MSN, along with other ISPs, uses this transmission capacity input and combines it with other features to offer an "information service" to end user customers. Of course, the Commission found in its *Report to Congress* that ISPs such as MSN that offer high-speed Internet access provide an "information service" not subject to Title II regulation, and this proceeding certainly presents no opportunity for the Commission to revisit that question.[4]

Those parties that oppose the *Qwest Petition* try to make much of the non-tariff elements of the MSN-Qwest relationship and seem to argue that taken together these elements dislodge MSN as the party responsible for the retail relationship with the customer and elevate Qwest. MSN not only objects to that characterization of the specific details, but it bargained to make sure that was not the case.

First, a close analysis of the specific elements identified by the Minnesota Department of Commerce ("MN DOC") and others demonstrate that what they attack as evidence that MSN is not in control of the retail relationship are in fact unexceptional examples of carrier-provided services to a third party. Consider billing and collection. Qwest accurately states that MSN, like a number of other entities, purchases billing and collection services from Qwest. But as Sprint acknowledges, and as AT&T and WorldCom must concede, relying on an ILEC for billing and collection services does not transform the ILEC into a provider of the underlying service.[5] Indeed, long distance companies (including AT&T and WorldCom) for

[2] *See* http://resourcecenter.msn.com/access/broadband/default.asp.

[3] See *Qwest Petition*, Affidavit of John Meehan at 2.

[4] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11,501, 11,520 (1998) (*"Report to Congress")*

[5] Comments of Sprint Corporation at 3-4 (*"Sprint Comments")*. *See also* Comments of AT&T Corp. at 13 (*"AT&T Comments"*) (recognizing that an ILEC agreement to provide only billing services in connection

(continued...)

many years have relied on the Bell companies and other ILECs for billing and collection services. The opponents of the *Qwest Petition* also point to the sales agency arrangement that MSN has with Qwest. But as Sprint makes clear in its comments, this also is unexceptional. Sprint points out that the Commission permits the ILEC affiliate of a Bell company to offer sales agency services to the long distance affiliate of a Bell company, without violating the Commission's restriction against a local company affiliate of a Bell company directly offering long distance service to consumers.[6] Thus, the sales agency relationship that Qwest has with MSN is not unusual or contrary to Commission precedent.

The opponents of the *Qwest Petition* also try to raise concerns with the customer care aspect of how MSN customers are handled. As Qwest accurately states, MSN looks to Qwest to establish the DSL line and also to address certain trouble-shooting issues.[7] But contrary to the suggestion of the MN DOC, this allocation of responsibility is not unusual and is consistent with general industry practice. In the long distance arena, for example, it is certainly common for a resale carrier to attempt to handle the first-level complaints that may arise from use of its service, but then to turn to the underlying long distance carrier, the entity who controls the raw transmission capacity, for more difficult trouble-shooting. The fact that MSN has contracted with Qwest for a similar trouble-shooting protocol is unremarkable. The Commission also can draw on the experience in the local competition arena, in which many interconnection agreements provide for just this sort of escalation of trouble-shooting to the underlying carrier if the customer (in that case, the competitive carrier) cannot remedy the problem. The CLEC experience also sheds light on the establishment of the DSL line. CLECs that rely on resale clearly are dependent on the ILEC for establishing the line, but there is nothing in the Commission's *Local Competition Order*[8] or subsequent decisions to suggest that the reselling CLEC is not in control of the retail relationship with the end user.

Second, this focus on the operational details of the DSL service, which clearly puts the Qwest offering in the same category as the ILEC offering under review in the *AOL Bulk Services Order*, is just a prelude to the overarching question that should be the focus of the Commission's inquiry: "Who owns the customer?" This is the ultimate expression of which party is offering the service "at retail." In the everyday world of business, "Who owns the customer?" is the question that business people making deals ask as they review the specifics of a commercial relationship. Why? Because the party that "owns the customer" gets to build a relationship with the customer, to sell him or her related products or services, to gather information about the customer, to earn revenue from the customer (regardless of who actually

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with a bulk sale of DSL-based telecommunications services could properly be deemed a non-retail arrangements that does not trigger the resale obligation).

[6] *Sprint Comments* at 4-5.

[7] *Qwest Petition*, Meehan Affidavit at 4.

[8] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15,499 (1996) ("*Local Competition Order*").

collects it), and to win (or lose) when the customer pays her bill (or fails to). In short, the party who "owns the customer" is responsible for the relationship with the retail customer. The other party, the entity that does not own the customer, simply provides an input service, frequently a commodity service, that enables the party with the customer relationship to reap most of the economic benefit because that party is taking most of the economic risk.

Though MSN, like other ISPs, is not in a position to divulge all the details of its relationship with its underlying carrier, suffice it to say that having a primary relationship with the end user customer was an important focus of MSN's negotiations with Qwest. And MSN is confident that it has the customer relationship. What is the basis for that belief? MSN gets revenues when customers pay their bills and bears the financial risk when customers refuse to pay. MSN decides the service level that customers should have. MSN decides whether there are limits or restrictions on use of the transmission capacity (such as what some cable operators have imposed), or, as in the case of MSN, whether no restrictions should apply. MSN provides content and critical branding to customers and unfettered surfing of the Internet, and it is these features, as opposed to the nature of the underlying transmission capacity, that customers identify as the reason for purchasing one ISP over another. Indeed, this content, such as Hotmail, and branding, such as MSN (which is supported by MSNBC and other advertising vehicles), is critical because the transmission capability that Qwest offers to MSN and other ISPs is a commodity input service that does little to distinguish MSN in the marketplace from its competitors.[9] Thus, MSN is confident that its customers view the provider of the Internet experience as MSN, and the fact that others may provide services and assist MSN in meeting the needs of its customers does not alter that conclusion.

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Based on the above facts and other information submitted for the record, MSN urges the Commission to rule that the offering by Qwest to MSN is a wholesale offering not subject to the resale requirements of Section 251(c)(4). MSN does not ask the Commission to issue a broader ruling, as some have characterized Qwest as seeking, that would foreclose inquiry of different arrangements between ILECs and ISPs. However, MSN is confident that the inquiry that the Commission called for in the *AOL Bulk Services Order* will lead it to conclude that Qwest is engaged in a wholesale offering of DSL service.

II. The Commission Need Not, and Should Not, Reach Qwest's Claim That the *Wireline Broadband NPRM* Precludes a Section 251(c)(4) Analysis.

As an alternative basis for its requested declaratory ruling, Qwest contends that because the Commission tentatively concluded in the *Wireline Broadband NPRM*,[10] that an

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[9] Even the MN DOC acknowledges that two other ISPs receive the same DSL bulk offering that MSN purchases. Comments of the MN DOC at 5-6 ("*MN DOC Comments*").

[10] *In the Matter of Appropriate Framework for Broadband Access to Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, 14 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*").

ILEC's provision of Internet access service to end users is an information service, then that tentative conclusion means that even if the critics of Qwest are correct in establishing Qwest's control of the retail relationship, that nevertheless its offering of DSL service at retail is no longer subject to Section 251(c)(4).[11] MSN takes a different view.

First, the Commission's *Wireline Broadband NPRM* asks many important questions, and all affected parties and the public are on notice of the Commission's tentative conclusion to include all advanced services offerings of ILECs under the heading of "information services."[12] Comments have been submitted and reply comments are being penned. That important question should be debated and resolved in the context of that proceeding, and the instant matter should not prejudge, or be unnecessarily tied to, the outcome there.

Second, MSN certainly does agree, and sees no one doubting, that the offering by MSN and every other ISP of transmission capacity plus Internet capability *to end users* is an "information service" not subject to Title II regulation. However, as we understand it, the question before the Commission is whether the bulk offering by Qwest to MSN, which is not an end user, along with other non-tariffed activity somehow transforms Qwest's offering into an "at retail" offering subject to the resale requirements of Section 251(c)(4). Thus, the question posed in the *Wireline Broadband NPRM* – whether a residential offering of Internet access service by an ILEC is subject to Section 251(c)(4) – is interesting but it does not resolve the question posed in the *Qwest Petition*. Accordingly, MSN urges the Commission to resolve this Petition promptly on the merits without reaching the thorny questions that are raised in the *Wireline Broadband NPRM*.

Conclusion

For the reasons stated above, the *Qwest Petition* should be granted to the extent that Qwest requests a ruling that its offering of bulk DSL services to MSN constitutes a wholesale offering not subject to the resale requirements of Section 251(c)(4).

Respectfully submitted,

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[11] *See Qwest Petition* at 12-13.

[12] *Wireline Broadband NPRM* ¶ 16.